



## Duty of Candour Procedure

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<b>Owner:</b>	Colin Phillips	<b>Job Title:</b>	Assistant Director – Care & Support
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### Version Control

Date	Owner	Version	Reason for Change
June 2021	Nikki Fildes	2.1	Scheduled review
Apr. 2020	Nikki Fildes	2.0	New procedure template

### Summary of Changes

Section	Change
All	C&S management titles amended to reflect current structure
All	'service user' changed to 'supported person'
All	Responsibility for activation changed to Operations Manager
All	Include references to relevant policies and procedures
s.3, s.4, s.5, s.6	Combined with use of subheadings for clarity
s.10, s.11, s.12	Combined with use of subheadings for clarity



# Duty of Candour Procedure

## Contents

1.0 Introduction .....	3
1.1 Terminology .....	3
1.2 Legal framework .....	3
2.0 What activates the duty? .....	4
2.1 Outcomes .....	4
3.0 Activating the duty of candour .....	5
3.1 Ark .....	5
3.2 The RHP .....	5
4.0 Notification .....	6
5.0 Meeting with the relevant person .....	7
5.1 Subheading (Can be copied to other sections) .....	7
6.0 The written apology .....	8
7.0 The review .....	9
7.1 The written report of the review .....	9
7.2 Sharing the report .....	10
8.0 Other organisations .....	10
9.0 Legal claims .....	11
10.0 Records retention, reporting and monitoring .....	11
11.0 Implementation and Review .....	12
11.1 Implementation .....	12
11.2 Review .....	12
Appendix 1 Flow chart .....	13
Appendix 2 statutory guidance .....	see folder

## 1.0 Introduction

Openness and honesty are important when providing care services. Trust can be difficult to maintain, and easy to lose, when things go wrong. The organisational duty of candour is a legal obligation for care services to apologise, offer to meet with an individual, and meaningfully involve them in a review, should they be involved in a serious adverse event.

This procedure details how Ark will ensure the duty of candour is activated when required.

As the staff members responsible for activating and undertaking the duty of candour procedure, all Care & Support Managers (CSMs), Operations Managers (OMs), and Regional Managers (RMs) must read this procedure and confirm their understanding via Ark's LearnPro e-learning system.

### 1.1 Terminology

For the purposes of the duty of candour, and this procedure:

- The 'relevant person' is the supported person affected, or their legal representative (if the relevant person has died, or lacks capacity)
- The 'registered health professional' (RHP) is usually the relevant person's GP, and is should, where possible, be a health professional with an existing relationship with the relevant person. It cannot be a health professional who was directly involved in the incident.

### 1.2 Legal framework

- Health (Tobacco, Nicotine, and Care, etc.) (Scotland) Act 2016
- Duty of Candour Procedure (Scotland) Regulations 2018
- Organisation Duty of Candour: guidance (Scottish Government, 2018)

## 2.0 What activates the duty?

The duty of candour must be activated as soon as reasonably practicable when the responsible person becomes aware that:

1. an unintended or unexpected incident has occurred during the provision of Ark's care service, **and**
2. it is the reasonable opinion of an RHP that:
  - a) the incident appears to – or could – result in any of the outcomes listed below **and**
  - b) the outcome related directly to the incident, rather than the natural course of the relevant person's illness or underlying conditions.

### 2.1 Outcomes

- a) the relevant person's death
- b) 'severe harm' - permanent lessening of bodily, sensory, motor, physiologic or intellectual functions; including organ or brain damage
- c) 'harm' – anything that results in one or more of the following:
  - an increase in the relevant person's treatment
  - changes to the structure of their body
  - an impairment to sensory, motor or intellectual functions that have lasted, or are likely to last, for at least 28 continuous days
  - the relevant person experiences pain or psychological harm that has lasted, or is likely to last, for at least 28 continuous days
- d) The relevant person requires treatment by a RHP to prevent
  - death
  - an injury, that if untreated, could lead to anything listed in (b) or (c) above.

## 3.0 Activating the duty of candour

### 3.1 Ark

If an incident occurs in a service that the Care & Support Manager (CSM) thinks may meet the criteria for activation listed in **section 2** above, they must advise their Operations Manager (OM) immediately. If the OM was involved in the incident, they should seek advice from their Regional Manager (RM), who may nominate a different OM to activate the duty.

The OM will review the details of the incident, advise their RM and seek their guidance if required.

If the OM determines the criteria in **section 2** have been met, either the OM or the relevant CSM will contact the RHP to seek their opinion on activating the duty.

Note that this duty does not replace the requirements of **HS04 Incident Reporting** and both procedures must be followed. The OM must ensure that the incident reporting indicates that the duty of candour has been considered in relation to the incident.

Note that incidents of this nature are likely to be notifiable to the Care Inspectorate, and may be an Adult Support & Protection issue (see: **G57a Adult Support & Protection**). They may also be the subject of a complaint (see: **G13 Complaints**).

### 3.2 The RHP

The RHP must first give their professional opinion on the incident in order to activate the duty; this should be a view on the incident and its relationship to the possible outcomes listed in **section 2** above. The RHP cannot have been involved in the incident, but should where possible be someone with a pre-existing relationship with the relevant person.

The RHP does not need to provide a detailed analysis of the incident. It is simply a view to inform a decision about activating the duty of candour.

The CSM/OM should provide at least the following in order for the RHP to form a view:

- what the incident was
- what the outcome was
- any illnesses and underlying conditions the relevant person has

If it is the reasonable opinion of Ark that the relevant person lacks capacity, and there is no guardianship order in place, the RHP should also be asked to provide an opinion on whether they agree this is the case.

If the RHP asks for further information in order to provide their opinion, the CSM/OM will comply in order to ensure that Ark complies with the duty of candour regulations. CSMs/OMs must also ensure they follow **G24 Privacy and Data Protection** and **G13 Openness & Confidentiality**, and should seek guidance from the Compliance & Improvement Business Partner regarding data protection if required.

The RHP must provide their view on:

- based on the information provided to them, it appears that the incident has resulted, or could result in, the outcomes listed in **section 2**
- whether the natural course of the relevant person's illnesses or conditions directly relates to the death or harm described

If the RHP is not clear whether the criteria for the activation have been met, the CSM/OM must clarify this with them. If the opinion of the RHP is not clear in relation to the criteria in **section 2**, the duty of candour cannot be activated.

If the RHP thinks it is unlikely that harm will occur, the duty of candour will **not** be activated.

If the RHP confirms that an outcome listed in **section 2** has occurred, or is likely to, and it relates directly to the incident, the duty of candour **will** be activated.

## 4.0 Notification

The duty of candour procedure starts on the date that Ark receives confirmation from the RHP.

The relevant person must be notified as soon as reasonably practicable, which must be within 10 working days of the start date.

The OM, with support from their RM if required, should decide who will notify the relevant person. This can be any member of the Care & Support management team, but it is expected that it will usually be the OM. The OM should also agree the content of the notification with their RM.

The following should be considered to determine who should notify the relevant person:

- Who from Ark is already in contact with the relevant person?
- The relevant person's support needs and communication preferences – including our duty to make reasonable adjustments
- The information exchanges and communication that have already taken place
- The relevant person's understanding of both the incident, and Ark's response to date
- Where and how the conversation should take place

- Should other members of staff be part of the conversation?
- Support available to the relevant person before, during and after the conversation
- Who will be the single point of contact in relation to the duty of candour following the discussion – usually the OM.

Notification may be through the relevant person's preferred communication method (for example; face-to-face, a letter, email or phone call) and must include:

- an account of the incident, to the extent that Ark is aware of the facts at that time
- an explanation of the actions Ark will take as part of the procedure

If the procedure start date is later than 1 month after the incident occurred, the notification must also explain the reason for the delay.

The relevant person must also be asked how they would prefer the information relating to the duty of candour procedure provided to them, and advised how their information will be stored (see: **section 9** below, and **G17 Retention of Documents**).

If the relevant person cannot be contacted, or does not wish to speak to Ark, this must be recorded. All attempts to contact the relevant person must be included in Ark's written record of following this procedure.

## 5.0 Meeting with the relevant person

The OM must invite the relevant person to a meeting following the notification. The relevant person must be provided an opportunity to ask questions in advance of this meeting. While it is expected that the OM will usually be the Ark representative at the meeting, it may be, as per **section 4** above, any member of the Care & Support management team. The meeting may also be attended by other Care & Support staff, or relevant Ark function as required (for example, the Compliance & Improvement Business Partner). The OM will agree the content, agenda and format with the RM.

The OM must ensure that any reasonable adjustments are in place to ensure the meeting is accessible to the relevant person. This could include, for example; the timing and location of the meeting, provision of an interpreter, or attendance by an independent advocate or other individual chosen by the relevant person for support.

The meeting must include:

- a verbal account of the incident
- an explanation of any further steps that will be taken by Ark to investigate the incident and any circumstances that Ark considers may have led or contributed to the incident

- an opportunity for the relevant person to ask questions about the incident
- an opportunity for the relevant person to express their views about the incident
- the provision of information to the relevant person about any legal, regulatory, or review procedures that are being followed regarding the incident in addition to the duty of candour. This should include an explanation of their scope and focus.

In addition to the mandatory elements above, in circumstances where Ark considers that the incident was contributed to by factors affecting the capability of an employee, it may be of benefit to advise that in addition to the systems review taking place, a separate process will be undertaken to identify whether the employee/s will benefit from support, and/or consider matters not related to organisational review.

Note that Ark will not share details of any disciplinary procedures as a result of the review, as this may amount to a data protection breach. Advice regarding this may be sought from the Compliance & Improvement Business Partner.

After the meeting, the relevant person must be provided with:

- a written note of the meeting. This contents should be agreed with the relevant person, but does not need to be a verbatim account
- the OM's contact details so the relevant person may contact them regarding the duty of candour procedure

If the relevant person is unable, or does not wish, to attend the meeting, the OM must still provide them with the information above, if the relevant person would like this.

## 6.0 The written apology

In addition to any apology provided at the time of the incident, as part of the duty of candour, a written apology must be offered to the relevant person. This may be a letter or via email, if preferred.

The written apology must be personal and provided at an appropriate time during the process. It must take account of the circumstances and facts of the incident, and should be provided without delay wherever possible. It should take account of the relevant person's circumstances, and where possible, the known impact or personal meaning of the incident to the relevant person.

The OM will draft the apology, and agree it with both the RM and Assistant Director of Care & Support (ADCS) prior to sending.

Factors to consider in the written apology:



- not distancing Ark from the apology
- not letting there be any doubt that Ark accepts the harm it has caused
- using plain, clear language free from jargon
- ensuring the apology sounds natural and sincere
- not using the apology to question the extent of harm suffered
- not using the apology to minimise the incident
- ensuring the apology is directed to the right person/s

The apology does not equate to an admission of liability. In this context, the apology is a statement of sorrow or regret in respect of the incident. The apology, nor any part of the duty of candour procedure, amounts to an admission of neglect or a breach of any statutory duty. Further information on the apology can be found in the statutory guidance (see: **Appendix 2**).

## 7.0 The review

Ark must undertake a review of the circumstances which the staff team considers to have led or contributed to the incident. There is no prescribed format for the review, but it should involve professionals with relevant subject matter expertise. The RM will decide who should lead the review.

Best practice in reviewing these types of incidents is to use a systems approach, with an emphasis on the contributory factors that led to the incident occurring. Further information on this can be found in the statutory guidance (see: **Appendix 2**).

The review must be completed within 3 months of the procedure start date. If this is delayed, the OM must contact the relevant person to explain why the review is delayed.

The review must seek, and take into account, the views of the relevant person. If the relevant person does not wish to provide their views, this must be made clear in the report.

### 7.1 The written account of the review

A written account of the review must be completed, to include:

- a description of how the review was carried out
- a statement of any actions taken by Ark to improve systems and processes as a result
- any learning shared with other persons or organisations in order to support continuous improvement of health and social care

- a list of actions taken for the purpose of the duty of candour, and the date completed. This list will provide an overview of the process from the point the duty of candour was activated to the point the review was concluded

The written report provides an opportunity to demonstrate that the views of the relevant person have been considered, and that a review focused on systems analysis that takes account of best practice has been undertaken.

The written report will be undertaken by the same person who carried out the investigation, unless otherwise agreed by the RM. The RM must approve the written report prior to sharing with the relevant person.

## 6.2 Sharing the report

The relevant person will be offered:

- a copy of the written report of the review
- details of any further actions taken for the purpose of improving the quality of Ark's services (or other services)
- details of any support or services which may be able to provide assistance to the relevant individual

## 8.0 Other organisations

The duty of candour is the legal responsibility of the organisation that provided the service where the incident occurred. For incidents that occur during Ark support, this will usually be Ark.

It may be that other organisations are involved in the incident. Although they will not be responsible for activating the duty, they may need to become involved in providing information as part of the review, or in providing support to the relevant person.

If more than one organisation needs to be involved in the review, all parties will be expected to cooperate fully throughout the procedure and share lessons learned and necessary actions identified.

Where other organisations are involved, but it is Ark that has activated the duty of candour, Ark must inform the relevant person as part of the notification process that it is Ark that will carry out the procedure, involving those other organisations as necessary.

## 9.0 Legal claims

It is not appropriate for Ark to try to prevent the relevant person from making a legal claim in relation to the incident. If the issue is raised by the relevant person during the duty of candour process, Ark may suggest that the relevant person may wish to delay making a claim until the duty of candour had concluded, when:

- their case will have been investigated
- they will have received an apology, and
- any actions to improve the quality of care and/or learning will have been identified

If the relevant person advises they are considering making a legal claim, the duty of candour procedure should continue. If Ark receives formal notification of the commencement of legal proceedings, then some element of the duty of candour may need paused until the legal process is concluded. Internal reviews, for example, could continue, and Ark will still try to identify any potential learning and improvement actions.

If a legal claim is made during the duty of candour procedure, the OM will agree with the RM and ADCS which aspects of the procedure may be continued, and which should be paused, in addition to agreeing revised timescales as necessary.

## 10.0 Records retention, reporting and monitoring

A written record must be kept for each incident to which the duty of candour procedure is applied, including a copy of all documentation and correspondence relating to the application of the procedure. Records should be kept in the relevant folder for the service on Ark's general drive.

Records should be kept for as long as Ark provides a service to the relevant person, and for 5 years after the service ends, or a period of 3 years if the service ends due to the death of the relevant person. At this point, records will be deleted in accordance with **G17 Retention of Documents**.

An annual duty of candour report must be prepared and published on Ark's website, as soon as reasonably practicable at the end of the financial year. It must include:

- information about the number and nature of incidents to which the duty of candour procedure has been applied in relation to Ark's services
- an assessment of the extent to which Ark carried out the duty of candour; including information about the process for identifying and reporting relevant incidents, and support available to staff and relevant persons affected by such incidents

- information about changes made to Ark policies and procedures as a result of duty of candour
- any other information Ark believes appropriate

The report will be fully anonymised, and will not contain any information that may lead to the identification of any individual.

The report will be drafted by the Compliance & Improvement Business Partner, and agreed with any relevant Senior Leadership Team member before publishing.

The Care Inspectorate will ask Ark services to confirm that the duty of candour report has been published in the first annual return due after the end of the financial year.

## 11.0 Implementation and Review

### 11.1 Implementation

CSMs, OMs, and RMs are responsible for the implementation of this procedure.

### 11.2 Review

The Assistant Director of Care & Support will ensure this procedure is reviewed in line with Ark's policy and procedure review process; at least every 3 years.

## Appendix 1 – flow chart



